Petition

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. _____

ROBERT MARCHESE, ANTHONY DELESSIO and RICHARD SHASHATY,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether evidence seized should be suppressed which was seized pursuant to a search warrant issued by a United States Magistrate to a United States Postal Inspector when the affidavit for the warrant contained an intentional misstatement of fact or an omission of fact made with reckless disregard for the truth.

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Petitioners, Robert Marchese, Anthony Delessio and Richard Shashaty, respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on October 13, 1981.

OPINION BELOW

The Court of Appeals entered its judgment affirming the petitioners' conviction on October 13, 1981. A copy of the opinion is annexed as Appendix A. A petition for rehearing with a suggestion for rehearing en banc was duly filed and the order denying said petition for rehearing was denied on December 18, 1981. A copy of this order of denial is attached as Appendix B.

JURISDICTION

On October 13, 1980, the Court of Appeals entered judgment affirming the conviction of the defendants for conspiracy to commit mail fraud and for using the mails to promote a fraudulent weight-loss scheme in violation of 18 U.S.C. §§2, 371, and 341. The Court of Appeals denied the defendants' petition for rehearing on December 18, 1981.

Jurisdiction to review the judgment of the Court of Appeals is conferred upon this court by Title 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> . . . No Warrants shall issue, but upon probable cause, supported by Oath or affirmation, . . .

STATEMENT OF THE FACTS

Robert Marchese, Anthony Delessio and Richard Shashaty were indicted together with defendants George and Albert Carapella in a 100 count indictment charging 99 counts of mail fraud and 1 count of conspiracy. The indictment alleged that the defendants formed Eric-Way Corporation in order to market a weight-loss plan known as the Sultron Diet formula. Five of the Six defendants, including Marchese,

Delessio and Shashaty were tried and convicted of one mail fraud count and the conspiracy count.

Robert Marchese, Anthony Delessio and Richard Shashaty were convicted by the use of 124 collective exhibits of evidence containing many more individual pieces of evidence which were seized by agents of the United States Government upon execution of a search warrant for Room 14 of the Brandon Motor Lodge, Brandon, Florida. Appellants herein argued that the affidavit upon which the search warrant was issued contained mistatements or omissions of fact made intentionally or with reckless disregard for the truth which would require suppression of the evidence seized pursuant to the warrant. The trial court disregarded the sworn testimony of two disinterested witnesses, Ms. Goldie Bailey and Ms.

Alice Hartman, which testimony was in direct conflict with the facts stated in the affidavit upon which the search warrant was issued and in direct conflict with the Postal Inspector's testimony given at the hearing of defendants' Motion to Suppress.

The structure of the mail fraud scheme was presented by the Government at trial through co-defendant Tim Van Horn, who had plead guilty and testified on behalf of the Government. The government's case, through Mr. Van Horn, was tied together against defendants herein by the introduction of many pieces of physical evidence which contained fingerprints and/or other proof of association of the evidence with the defendants herein. The majority of the government's evidence was seized pursuant to a search warrant issued by a United States Magistrate in Tampa,

Florida for search of Room 14 of the Brandon Motor Lodge in Brandon, Florida. Appellants herein by Motion to Suppress, challenged the affidavit and search warrant on the basis that it contained a misstatement or omission of fact made intentionally or with reckless disregard for the truth such as would require suppression of the evidence seized pursuant to the warrant.

On October 13, 1981, the Court of Appeals for the Sixth Circuit entered an Order affirming the convictions of Marchese, Delessio and Shashaty. (The Court of Appeals' Order is attached hereto in the Appendix to this Petition) Appellants Marchese, Delessio and Shashaty then petitioned the Court of Appeals for a rehearing based on a critical misapprehension of the evidence elicited in the Motion to Suppress. Defendants additionally sug-

gested that the appeal should be reheard en banc, which was denied on December 18, 1982. (A copy of the order of denial is attached as Appendix B.)

REASONS FOR GRANTING THE WRIT

The Court of Appeals' Order approves the action of the Distict Court in refusing to accept the sworn testimony of the original informant used by the postal inspectors in obtaining the search warrant and the sworn testimony of an eye witness to the actions of the postal inspectors during the time that they were gathering information in preparation of the affidavit and search warrant. These two witnesses were disinterested parties, uninvolved in any way in the outcome of the trial of the defendants and their testimony, if believed, seriously challenged the propriety of the postal inspectors conduct

in this case.

Facts in dispute center around statements made in the affidavit for the warrant and statements contained in the depositions taken from the named from the named informant, Mrs. Goldie Bailey, and from another motel employee, Mrs. Alice Hartman. The affidavit states that upon Inspector McKenzie's initial inquiry, Mrs. Bailey "of her own volition" went to the room in question, thoroughly inspected the contents of the room, and reported that she had seen various items of mailing equipment, the company name Bar-Jon, and a return address in Bartow, Florida. The depositions read from at the suppresion hearing, however, stated that Mrs. Bailey did not return to the motel room after Inspector McKenzie's arrival at the motel, and that Mrs. Hartman was instructed by McKenzie to

and in fact did, go back to Room 14 to "take a closer look". Further, the depositions state that it was Mrs. Hartman who informed Inspector McKenzie of the specific contents of the motel room. Mrs. Hartman also stated that prior to her return, at the request of the postal inspector, she had no knowledge of the name of the company, the return address of the company, or the specific contents of the room.

Although the Sixth Circuit Court in United States v. Luna, 525 F.2d 4 (6th Cir. 1975) cert. denied, 424 U.S. 965 (1976) first addressed this issue, the United States Supreme Court has more recently announced a standard for the availability of a sub facial veracity attack on a warrant affidavit and what must be shown to require that the warrant be invalidated. (Franks v. Delaware, 438 U.S. 154, 171 (1978). In

summary of its decision in Franks, the Court held:

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held ing be held at the defendant's request. In the event that at that hearing the allegations of purjury or reckless disregard is established by the defendant by finding of probable cause, the Fourth Amendment requires that a hearing be held at the defenant's request. In the event that at that hearing the allegation of purjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side if the affidavits remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. Franks v. Delaware, 438 U.S. at 155-56.

While Franks dealt only with mis-statements, it has been recognized in

other circuits that allegations of material omissions of facts should be treated much the same. United States v. Martin, 615 F.2d at 328, United States v. Park, 531 F.2d 754, 758-59 (5th Cir. 1976).

Here, as was the case in United States v. Martin, (since the District Court allowed the defendants to present evidence regarding the misstatements and omissions at the hearing on the motion to suppress), the sole issue present was whether the defendants proved by a preponderance of the evidence that the misstatements and omissions were in fact made, that said misstatements and omissions were made either intentionally or with reckless disregard for the truthfulness of the affidavit and that had it not been for the misstatements and omissions the affidavit would not have supported a

finding of probable cause. United States v. Martin, 615 F.2d at 328. If all three of these elements are proven by a preponderance of the evidence the warrant must be voided and the evidence seized pursuant thereto must be suppressed. Franks v. Delaware, 438 U.S. 154 (1978); United States v. Martin, 615 F.2d 318 (5th Cir. 1980); United States v. Barone, 584 F.2d 121 (6th Cir. 1978).

The pertinent part of the affidavit in the instant case reads as follows:

> On her own initiative Mrs. Bailey went to Room 14 which was then being cleaned by maid, Lucile Green. Mrs. Bailey returned and told Inspector McKenzie she thought there was something strange going on in Room 14 because she had observed scattered about the room numerous pill bottles, padded mailing bags, a postage scale, and other unusual items not normally found in a motel room. Mrs. Bailey further related that the company name Bar-Jon appeared on one or more of the articles she had observed lying in the room. . .

The record at the hearing on defendants' motion to suppress, however, establishes that the depositions of Mrs. Bailey and another motel employee, Alice Hartman, conflict dramatically with the facts as stated in the affidavit. Mrs. Bailey, in her deposition, stated that she had briefly been in Room 14 prior to the arrival of Inspector McKenzie, but that she had paid little or no attention to the particular contents of the room. Mrs. Bailey also testified in her deposition that she did not go back into Room 14 after Inspector McKenzie arrived until the time of the actual seizure of the contents of the motel room pursuant to the search warrant. Further, Mrs. Hartman, in her deposition, states that she had also briefly been in Room 14 prior to the arrival of Inspector McKenzie and that she had no specific

recollection at that time as to the contents of the room. She also stated that she was asked by Inspector McKenzie to return to the room to take a closer look at the contents of the room. She returned to the room, made note of the rubber stamp containing the company name and return address and other specific items and informed Inspector McKenzie of what she had discovered. She also stated that prior to her return, at the Inspector's request, she did not know the name of the company or the address.

The defendants urge that the evidence produced at the hearing establishes by a preponderance of the evidence that material misstatements and omissions of fact were made. To hold otherwise would require that every defendant, seeking to attack the veracity of an affidavit, produce only

those witnesses who had kept a written record of the events that had transpired. Surely this is not the burden required by Franks v. Delaware. Such a burden would circumvent the very essence of the Warrant Clause requirement that the warrant be issued by a neutral and detached magistrate only upon probable cause supported by oath or affirmation.

Here two totally disinterested persons gave testimony, under oath, that directly contradicts that of Inspector McKenzie.

In order to vitiate the affidavit the defendants must show by a preponderance of the evidence that with the misrepresentations corrected what remains of the affidavit is still insufficient to support a finding of probable cause. Franks v. Delaware, 438 U.S. at 171; United States v.

Barone, 584 F.2d at 121. Clearly the materials which are the subject of the deliberate or reckless falsity in the present case are necessary for a probable cause determination. No other reason is apparent to the writer which could have motivated Inspector McKenzie to ask Mrs. Hartman to return to Room 14, if in fact, the information Mrs. Bailey had supplied him with approached probable cause. With the falsity removed all that remains of the affidavit is the bare conclusory statement of Mrs. Bailey as stated in the affidavit, "There was something strange going on in Room 14". This statement itself is based only on Mrs. Bailey's brief observation where she concluded that Room 14 contained items not normally found in a motel room. Clearly such a statement does not meet the standards of Aguilar v. Texas, 378 U.S. 108

(1964) and Spinilli v. United States, 393 U.S. 410 (1969).

It is respectfully submitted that the decision of the Sixth Circuit Court of Appeals in this cause has so far departed from the accepted and usual course of judicial proceedings in that it sanctioned such a departure by the District Court as to call for the exercise of this Court's power of supervision. Further, the Sixth Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. Although this Court has addressed the issue previously of misrepresentations contained in an affidavit for a search warrant, Franks v. Delaware, it has not addressed the issue of omissions of fact by affiant's in seeking the issuance of search warrants.

CONCLUSION

For the reasons set forth above, Petitioners, Marchese, Delessio and Shashaty, request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Dated: February 26, 1982.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

David D. Silberberg, a member of the Bar of this Court, certifies that pursuant to Rule 33 he has served the Petition for Writ of Certiorari to the Court of Appeals for the Sixth Circuit on the counsel for respondent by enclosing a copy thereof, postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530 and depositing same in the mails at Memphis,

Tennessee, and further certifies that all parties required to be served have been served.

Dated: February 26, 1982.

David D. Silberberg &
Sam P. Bradley
Attorneys for Petitioners

Appendix

Filed
October 13, 1981
John P. Hehman, Clerk

Nos. 80-5157
80-5158

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee vs. ROBERT MARCHESE, RICHARD SHASHATY and ANTHONY DALESSIO, (80-5157), GEORGE CARAPELLA and ALBERT CARAPELLA, (80-5158) Defendant-Appellants	ORDER

Before: KEITH and MARTIN, Circuit Judges; and DUNCAN,* District Judge.

On September 10, 1979, defendant-appellants were indicted for conspiracy to commit mail fraud, and for using the mails to promote a fradulent

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* Honorable Robert M. Duncan, United States District Judge for the Southern District of Ohio, sitting by designation.

to examine the room and to report on its contents. They contend Mrs. Bailey merely told the inspectors "something strange was going on in Room 14." In her deposition Mrs. Hartman denied knowledge of the company's name or of the room's contents. Because of the apparent discrepancies between the affidavit and the informants' depositions, the District Court allowed defendants a hearing at which they could attempt to prove by a preponderance of evidence that the affidavit contained material misstatements and omissions. The District Court concluded on the basis of all the evidence that Mrs. Hartman's deposition testimony was not credible because she appeared to be a "busybody." The court credited instead Inspector McKenzie's

account of what took place because he took careful notes of the conversations and events. We see no abuse of discretion on the part of the District Court in determining that Inspector McKenzie's account was more believable than those of other witnesses. We are convinced that defendants did not meet their burden of proving that the affidavit contained material misstatements and omissions.

Defendants also contend that the warrant was defective under Aguilar v. Texas, 378 U.S. 108 (1964), because it did not show Mrs. Bailey's reliability as an informant on its face. After reviewing the record, we are convinced that the affidavit satisfies the second prong of Aguilar. Mrs. Bailey's statements concerning the blue van driven by

defendants and the room they occupied were corroborated by the inspectors' independent observations. As motel manager, Mrs. Bailey's observations Bailey's observations concerning unusual behavior and apparatus in guests' rooms are not instrinsically unreliable. Detailed information obtained from a named unpaid informant relating personal observations may afford ample indicia of reliability. See United States v. Campbell, 575 F.2d 5405 (5th Cir. 1978) (per curiam).

In related appeal No. 80-5158, defendants, the Carapellas, challenge the sufficiency of evidence on which the jury convicted them of conspiracy, aiding and abetting and mail fraud. Viewing the evidence in the light most favorable to the government, it estab-

lished that George Carapella, an officer of East Coast Printing Company, ordered the mailers and envelopes used in this scheme, that both designed the fraudulent advertisement, that machines owned by both George and Albert were used to insert the fraudulent advertisements into envelopes, and that both were in Memphis on numerous occasions with the other defendants in furtherance of the mail scheme. This is sufficient evidence in our view to support a guilty verdict on both counts of conspiracy and substantive mail fraud.

We find no merit in the other contentions raised by defendants. Accord-

ingly, we affirm the convictions as to all defendants.

ENTERED BY ORDER OF THE COURT

/s/John P. Hehman
Clerk

ISSUED AS MANDATE: December 29, 1981
COST: NONE

MANDATE APPLIES TO CASE #80-5157, only.

Filed
October 13, 1981
John P. Hehman, Clerk

Nos. 80-5157
80-5158

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee vs. ROBERT MARCHESE, RICHARD SHASHATY and ANTHONY DALESSIO, (80-5157), GEORGE CARAPELLA and ALBERT CARAPELLA, (80-5158) Defendant-Appellants	ORDER

Before: KEITH and MARTIN, Circuit Judges; and DUNCAN,* District Judge.

On receipt and consideration of a petition for rehearing and suggestion for rehearing en banc in the above-styled case; and

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* Honorable Robert M. Duncan, United States District Judge for the Southern District of Ohio, sitting by designation.

No judge in active service in this court having moved for rehearing en banc and the motion therefore having been referred to the panel which heard the case; and

The panel having noted nothing of substance in said motion for rehearing which had not been carefully considered before issuance of the court's order;

Now, therefore, the motion for rehearing is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/John P. Hehman
Clerk